In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 343

THOMAS W. NEALON,
Petitioner,

vs.

HARRY W. HILL, as Receiver of Intermountain Building & Loan Association, a corporation,
Respondent.

Brief of Petitioner in Reply to Brief of Respondent

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Table of Authorities Cited

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Brief of Petitioner in Reply to Brief of Respondent

Petitioner and his counsel regret that they are compelled to burden this court with a reply to the brief for the respondent filed in opposition to the petition for writ of certiorari. Inaccuracy of statement and discussion of extraneous matters found in respondent's brief in opposition prompts this reply.

I.

On page 11 of the brief of respondent it is incorrectly asserted as follows:

> "Petitioner urges that by the provisions of Rule 6(c) terms of court in some manner have been *abolished* and cites in support of that position *Sprague v. Ticonic National Bank,* 307 U.S. 161."

The same assertion is made on pages 12 and 24 of respondent's brief.

Petitioner does not assert that Rule 6(c) of the Rules of Federal Procedure has abolished terms of court. Such an assertion is not found in petitioner's brief in support of the petition for certiorari, and, if made, would be absurd. This question is discussed at pages 24 to 26, inclusive, of petitioner's brief. Petitioner there asserted, and now asserts, that since the adoption of Rule 6(c), the expiration of the term of the district court, *in this receivership proceedings in equity not closed,* in no way affected the power of that court to review the order of December 7, 1942 (R. 243) by the petition filed March 31, 1944 (R. 599). Rule 6(c) expressly conferred that power upon the district court, after term had expired, and the district court, having entertained the petition of March 31, 1944, to review the order of December 7, 1942, placed the latter order in position for review by appeal to the Circuit Court of Appeals. Consequently, the order of December 7, 1942, in equity, stood in the same position as the orders, in bankruptcy, which were reviewed by this court in the following decisions:

Wayne United Gas Co. v. Owens-Illinois Glass Co., 300 U.S. 131, 81 L.Ed. 557, 57 S.Ct. 382;

Bowman v. Lopereno, 311 U.S. 262, 85 L.Ed. 177, 61 S.Ct. 201;

Pfister v. Northern Illinois Finance Co., 317 U.S. 144, 87 L.Ed. 146, 63 S.Ct. 133.

Therefore, petitioner contends, not that Rule 6(c) abolished terms of court, but that the rule, when applied to this receivership proceedings in equity not closed, subjected the orders now involved, both in the Circuit Court of Appeals, and in this Court, to the rule of decision applicable to bankruptcy proceedings, as illustrated by the decisions of this court last cited, because the rule of practice announced in those decisions was drawn from equity and not from bankruptcy, and consequently, since terms of court in receivership proceedings in equity are now anachronistic, orders in receivership proceedings in equity stand like orders in proceedings in bankruptcy.

II.

Respondent, on pages 18 to 22, inclusive, of the brief in opposition asserts that petitioner, by accepting the benefits of the order of December 7, 1942, waived his right to appeal therefrom.

The question is not now involved and only serves to confuse the issue. But since respondent has raised the question petitioner thinks he is justified in discussing it.

In this respect the Circuit Court of Appeals said:

> "Whether the appellant, by accepting the benefits of the order of December 7, 1942, waived his right to appeal therefrom, need not be considered." (R. 706)

Notwithstanding this disposition of the question by the Circuit Court of Appeals in its relationship to this petition for writ of certiorari which is predicated upon procedural questions only, respondent asserts in his brief in opposition (p. 18) as follows:

> "* * * Inasmuch as this question is highly important and is discussed by the Circuit Court in its opinion * * * respondent feels that the matter should be presented in opposition to the petition * * *."

The question is highly important but it was not discussed by the Circuit Court of Appeals as petitioner asserts, but, on the other hand, was summarily dismissed by that court. The question did not enter into either its decision or judgment.

Confusing statements of this kind are not helpful to a correct disposition of this petition for certiorari which is invoked to settle important questions of practice arising from a correct construction of some of the Rules of Federal Procedure.

The voucher check which respondent, as receiver, tendered to petitioner under the order of December 7, 1942, is set forth in restricted form in the opinion of the Circuit Court of Appeals (R. 705). It is set forth in complete detail on pages 4 and 5 of the brief of respondent in opposition.

The check tendered was for the sum of $6,330.40. Of that amount $1,330.40 represented expenses *paid out and incurred by petitioner* as counsel for the petitioning creditors in the creditors' suit. The receiver did not tender to petitioner checks for separate amounts, that is the amount allowed as a fee by the district court, and the amount

allowed as expenses, but, on the other hand, the check tendered to petitioner required him to accept the check as written in order to reimburse himself for the expenses which he had incurred.

The order of December 7, 1942, recited that the award made to petitioner constituted "total compensation fixed and allowed for all services rendered by petitioner" (R. 246). The order further recited "that this is a final allowance and covers all services heretofore rendered by Thomas W. Nealon, as set forth in said petition, and as attorney for the former receiver" (R. 247). The petition filed October 15, 1937, by petitioner was limited to compensation for solicitor's fees in the creditors' suit (R. 160-161). Petitioner did not then claim compensation for services he had performed as solicitor for the receiver and in the ancillary receiverships. Petitioner, for the first time, claimed compensation for such services by the petition filed March 31, 1944 (R. 599). That petition was supported by petitioner's affidavit (R. 620). Petitioner then claimed the reasonable value of those services in the amount of $40,500.00 (R. 631). The claim was then before the district court for the first time.

The petition for solicitor's fees in the creditors' suit was not contradicted or contested by the respondent, as receiver. Experienced attorneys testified that the value of petitioner's services in the creditors' suit alone ranged from $100,000.00 to $200,000.00. *Monaghan v. Hill,* 9 Cir., 140 Fed.2d 31, 33. This testimony was not contradicted by respondent as receiver. In *Monaghan v. Hill,* page 34, the Circuit Court of Appeals said:

> "In the instant case the judge who fixed the fees assumed the federal bench after the services for which

compensation is claimed were rendered and is in no better position to judge the reasonable value of the work performed than are the judges of this court who have heard the argument and who have studied the record."

Measured by the character of check which the receiver tendered petitioner; the uncontradicted testimony of experienced attorneys as to the value of petitioner's services in the creditors' suit; the decision of the Circuit Court of Appeals in *Monaghan v. Hill,* 141 Fed.2d 31; the continuing control a district court exercises over its orders in a receivership proceedings in equity not closed; the affidavit of petitioner in support of his petition filed March 31, 1944, whereby petitioner estimated the reasonable value of his services on behalf of the first receiver, and in the ancillary receiverships, in the amount of $40,500.00, conjoined with the fact that petitioner has not been accorded an opportunity to be heard upon the extent and value of those services, petitioner believes he can assert successfully that under the circumstances appearing here, the acceptance of the check which was tendered to him by respondent, as receiver, did not constitute a waiver of his right to appeal from the order of December 7, 1942.

In all events, petitioner was entitled to more than he received under the order of December 7, 1942. Consequently, the acceptance by petitioner of that which he confessedly was entitled to receive, does not estop him from claiming that which is justly due, nor waive his right to appeal, as is exemplified by the following decisions of this court:

Embry v. Palmer, 107 U.S. 3, 2 S.Ct. 25, 27 L.Ed. 346, citing *United States v. Dashiel*, 3 Wall. 688;
Reynes v. Dumont, 130 U.S. 354, 9 S.Ct. 486, 32 L.Ed. 934;
Erwin v. Lowry, 7 How. (48 U.S.) 172, 184, 12 L.Ed. 655.

The order of December 7, 1942, foreclosing petitioner the opportunity to be heard upon services rendered to the receiver first appointed, and in the ancillary receiverships, was beyond the jurisdiction of the district court to render because the question was not before the district court.

Petitioner has not been accorded the opportunity to be heard upon his right and claim of compensation for those services.

In *Standard Oil Co. v. Missouri ex rel. Hadley*, 224 U.S. 270, 32 S.Ct. 406, 56 L.Ed. 760, this court said:

> "For even if a court has original general jurisdiction, criminal and civil, at law and in equity, it cannot enter a judgment which is beyond the claim asserted, or which, in its essential character, is not responsive to the cause of action upon which the proceeding was based. * * *"

III.

On pages 18 and 19 of respondent's brief in opposition respondent asserts that petitioner, by accepting the benefits of the order of December 7, 1942, has waived his right to appeal from that order and invokes decisions of the

Supreme Courts of Arizona and Utah which respondent argues controls the question here under

Erie Railroad Company v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188;

Ruhlin v. New York Life Ins. Co., 304 U.S. 202, 58 S.Ct. 860, 82 L.Ed. 1290.

Again the respondent's argument is extraneous to the issue now involved, measured by the limitation of the decision of the Circuit Court of Appeals, but in all events the argument is wholly misfounded.

Erie Railroad Company v. Tompkins, and the decisions of this court which follow, limit the rule there announced to diversity cases. Here the controversy is between petitioner as a solicitor, and respondent, as a receiver, initiated in a suit in equity then pending in the District Court of Arizona. The jurisdiction of the district court to entertain the petitions which the petitioner filed, and which are now under review, was not invoked because of diversity of citizenship as between petitioner and respondent.

Erie Railroad Company v. Tompkins, and similar cases, are not designed to abdicate the jurisdiction and power of federal courts to control proceedings and orders in receiverships in equity.

Federal courts in proceedings in equity apply the substantive law of the state only as it may be correlated with equitable remedies, in the application of which federal courts are uncontrolled.

Dodge v. Tulleys, 144 U.S. 451, 456, 457, 12 S.Ct. 728, 36 L.Ed. 501.

IV.

Estoppel or waiver arising from the acceptance of the benefit of a judgment, decree or order in a receivership proceeding in equity do not fall under the legal concept of the effect of a final judgment in an action at law or a final decree in a suit in equity.

The words of condition written by the receiver into the check which petitioner accepted cannot impair the legal effect of the order of December 2, 1942, under which the check was written, nor can they deprive the district court of its continuing power to review the order under which the check was delivered and accepted. The receiver is an arm of the court. Consequently, in the present case he stands not in the relationship of judgment debtor in the sense that he may invoke that relationship against petitioner as a judgment creditor.

The receiver is an officer of the district court which appointed him, and property which has come into his hands in the receivership proceedings is not, in a legal sense, in the receiver's possession, but is in the possession of the court by him as its officer.

> *Taylor v. Sternberg,* 293 U.S. 470, 55 S.Ct. 260, 79 L.Ed. 599.

Thus the receiver cannot, by any act upon his part, deprive the district court of power to control and revise its orders before the final termination of the receivership proceedings.

We continue to think that important questions of practice are involved which authorize the efforts of petitioner to have the decision and judgment of the Circuit Court of Appeals reviewed, especially in this receivership proceed-

ings in equity which has not passed to a final termination, in order that the allowance which has been made to petitioner may be reviewed either by the Circuit Court of Appeals or by this Honorable Court.

Respectfully submitted,

LESLIE C. HARDY,
Counsel for Petitioner.

THOMAS W. NEALON,
Pro Se.

Due service and receipt of a copy of the within is hereby admitted this.....day of September, 1945.

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Attorney for Respondent